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No. 88-217

In the Supreme Court of the United States

OCTOBER TERM, 1988

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY AND THE RAILWAY LABOR EXECUTIVES' ASSOCIATION, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY TO OPPOSITION

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TABLE OF AUTHORITIES

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REPLY TO OPPOSITION

The Interstate Commerce Commission's ("ICC" or "Commission") petition seeks review of a decision which severely limits the Commission's authority over the sale or transfer of rail properties under 49 U.S.C. 10901 and, hence, impairs the Commission's ability to supervise the rail system as it is charged with doing pursuant to 49 U.S.C. 10101 et seq.

The opposition to the Commission's petition is instructive. The Solicitor General does not say that the issues presented in the Commission's petition are not worthy of review. He does not say that another party can adequately represent the interests of the Commission in this case. He argues only that this Court should reject the Commission's petition because, in his view, the Commission had no right to become a party to the proceeding before the court below and that, even if it were a proper party below, the

Commission could not prosecute its appeal before this Court without his permission, which he has declined to give. The Railway Labor Executives' Association (RLEA), after utilizing self-help and the Railway Labor Act to frustrate the transaction authorized by the Commission's order, now claims that there is no longer a live case or controversy as regards the ICC. If the Court accepts the Solicitor General's or RLEA's view, the Commission, the central party to this critically important litigation which necessarily involves the negation of a Commission order, will be the only party having a vital stake in the outcome not to be heard.

(1) The Solicitor General argues that the Commission's acknowledged authority to appear by its own attorneys without prior approval of the Attorney General in proceedings involving the *validity* of Commission orders does not extend to collateral attacks on such orders.[1] This overly literal reading of the statute ignores the judicial gloss which was put on the statute by this Court's decision in *Venner v. Michigan Central Railroad Co.*, 271 U.S. 127 (1925), extending its reach to all judicial proceedings which negate the effectiveness of an order of the Interstate Commerce Commission.

The Solicitor General's view that only direct petitions for review which call into question the validity of Commission orders may be opposed by the Commission is both incorrect and short sighted. It is wrong because neither the statute nor the legislative history surrounding it requires

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[1] The Commission apologizes for the inadvertent omission of the three words "the validity of" from the reproduction of 28 U.S.C. 2323 in our petition and for any inconvenience this error may have caused the Court. However, as we will demonstrate, the addition of the missing three words does not diminish the merit of our argument and commentators have typically dealt with the section as if it were written in the manner set forth by the Commission.

such a narrow interpretation of the Commission's litigating authority.[2] In fact, the legislative history detailed in our petition points to the opposite conclusion.

In its deliberation over extending Hobbs Act review to Commission orders, Congress considered including an additional section to S. 663 to guarantee the ICC's right to continue to defend its actions "at all levels of judicial review independent of the discretion of the Attorney General of the United States" *H. Rep. No. 93-1569, 93d Cong., 1st Sess. reprinted in [1974] U.S. Code Cong. & Ad. News 7031.* The Committee expressly noted the Commission's fear of a "damaging qualification of their right to independent representation which they now enjoy as a matter of right." *Id.* To allay those fears the Committee pointed out that it intended the Commission to have the authority to participate independently in any litigation "affecting its interests." *Id.* at 7032. To this end the Congress sought and received the assurances of the Solicitor General and the Attorney General that the Commission would retain its independent litigating authority. *Id.* at 7034.[3] See also, *Judicial Review of Decisions of the ICC: Hearing on S. 663 Before the Subcommittee on Improvements in Judicial Machinery, Comm. on the Judiciary, 93d Cong.,*

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[2] The Solicitor General's citation to portions of the history of Section 2323 does nothing more than confirm that the Commission may participate in any action where the validity of its order is at issue. Moreover, it ignores the legislative history cited in the petition which demonstrates that Congress intended the Commission to have a broad grant of authority to litigate independently of the Department of Justice. *ICC v. RLEA,* No. 88-217 (p. 13-15).

[3] Despite the Solicitor General's current view that something less than independent litigating authority was meant by the Department of Justice in its letter to Congress, Congress was clear that it intended the ICC to have such independence. S. Rep. 93-500, 93d Cong., 1st Sess. 7 (1973).

1 Sess. (1973) (Hearing). Only after receiving these assurances did the Committee conclude that inclusion of the additional section was unnecessary.

A "collateral attack" on a Commission order, such as mounted by RLEA in this case, is no less damaging to the Commission's authority than a direct assault. Here, without seeking direct review of the validity of the Commission order approving the transfer, RLEA seeks to enjoin the sale. As in *Venner, supra*, 271 U S at 130 (1925), RLEA's attack is:

> essentially one to annul or set aside the order of the [ICC]. While the [complaint] does not expressly pray that the order be annulled or set aside, it does assail the validity of the order and pray that the defendant company be enjoined from doing what the order specifically authorizes, which is equivalent to asking that the order be adjudged invalid and set aside.

This attack is all the more destructive to the Commission's authority if the Commission is, as advanced by the Solicitor General, powerless to defend the order. This Court has been sympathetic to such concerns of administrative agencies in the past. *See, Federal Trade Commission v. Dean Foods Co.*, 384 U.S. 597, *606* (1966).

The Solicitor General contends (U.S. Br. p. 9, n.12) that *Pittsburgh & Lake Erie Railroad Co. v. RLEA*, 845 F.2d 420 (3d Cir. 1988) (*P&LE II*) disposed of this issue adversely to the Commission. However, the *P&LE II* court split on this issue and it is plainly an issue in the instant petition. (See also *RLEA v. Staten Island Railroad Corp.*, 792 F.2d 7 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 927 (1987) where the court upheld the rejection of a RLEA claim that the Commission approved sale of a line of railroad triggered rights under the RLA as a collateral attack on the Commission's orders. *Accord, United Trans-*

portation Union v. Norfolk and Western Railway Co., 822 F.2d 1114 (D.C. Cir. 1987)). Absent a showing not even suggested by the Solicitor General that our collateral attack allegation was frivolous, the fact that the majority of the lower court disagreed with our position on this dispositive jurisdictional issue cannot negate our right to have our argument heard, or the Court's right to have the benefit of such argument.

(2) The Solicitor General also argues, relying on *United States v. Providence Journal Co.*, 56 U.S.L.W. 4366 (May 2, 1988), that even if the Commission were a proper party below it could not seek a writ of certiorari under 28 U.S.C. 1254(1) but rather is limited in its rights by 28 U.S.C. 2350.[4] In support of the position, the Solicitor General advances arguments rejected by this Court in *ICC v. Oregon-Washington Rail Co.*, 288 U.S. 14, 24-26 (1933), in construing the provision which ultimately became 28 U.S.C. 2323 with, as the Solicitor General himself acknowledges (U.S. Brief 11-12), essentially no substantive change.[5]

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[4] As noted by the Solicitor General this argument against acceptance of a Commission filed petition for a writ of certiorari, the filing of which has not been authorized by him, has also been raised by the Solicitor General in urging rejection of the Commission's petition in No. 87-1938, *ICC v. State of Texas*. In that case, arising out of the Hobbs Act review of a Commission declaratory order, the Solicitor General does not challenge the Commission's party status in the proceeding below.

[5] The Solicitor General's citation to portions of the legislative history of review of Commission orders by the long defunct Commerce Court (U.S. Br. 9-11) fails to establish that the Congress, in concert with President Taft, intended to limit the Commission's role in defense of its orders.

Under the law as it existed prior to the passage of the bill establishing the Commerce Court the Commission "could institute an inquiry, have its own attorneys prepare and try the case before the

(footnote continued on next page)

As the Solicitor General recognizes, the ICC may represent its own interests in Hobbs Act cases, 28 U.S.C. 2348, and may bring a petition for a writ of certiorari under 28 U.S.C. 2350 without the Solicitor General. See also, *Stern, "Inconsistency" in Government Litigation*, 64 Harv. L. Rev. 759 (1951), cited with apparent approval in *Providence Journal, supra* at 4370, n.9.

Commission and then, if an order be entered, the Comission is sued and is required to defend the order entered." H.R. Rep. 923, 61st Cong. 2d Sess. 8 (1910). President Taft was of the view that Commission defense of its orders was an "inappropriate function" for the Commission. *Government Litigation in the Supreme Court: The Role of the Solicitor General*, 78 Yale L.J. 1442, 1448 (1969). However, members of Congress contended that the "most objectionable and harmful feature" of the bill was the section which granted the Department of Justice control of the defense of Commission orders:

> Thus, the amazing spectacle would be constantly presented of a review of the orders of the Commission not by a court, but the Department of Justice.

S. Rep. 355, Pt. 2, 61st Cong. 2d Sess. 5-6 (1910).

A compromise was forged with the Commission given specific grants of litigation authority. *78 Yale L. at 1449.* One grant allowed the Commission to intervene in cases on their own motion and another provision allowed it to be represented by its own counsel *"in suits involving its order"* (emphasis supplied) regardless of the Justice Department's conduct. *Judicial Resolution of Administrative Disputes Between Federal Agencies*, 62 Harv. L. Rev. 1050, 1057 (1949), citing 28 U.S.C. 2323.

No other agency has ever been granted the right to pursue its own litigation in such specific terms. 78 Yale L.J. at 1449. The Solicitor General's argument fails to acknowledge the "special status" the Commission enjoys by virtue of its ability to intervene when and where it chooses to defend its orders. 62 Harv. L. Rev. at 1057. Moreover, the Solicitor General does not even attempt to come to grips with the separation of powers argument based on this Court's decision in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) which would be presented if the Attorney General or Solicitor General's refusal to pursue an appeal from a decision negating a Commission order could foreclose the Commission from protecting its interests.

The Solicitor General argues, however, that the ICC, is strictly limited in its access to this Court by the express language of 28 U.S.C. 2350. Stated differently, the Solicitor General takes the position that 28 U.S.C. 1254(1), upon which the ICC based its petition is not available to the Commission because it is an agency covered by the Hobbs Act, 28 U.S.C. Chapter 158.[6] This approach overlooks the reach of the special grant of independent litigating authority in Chapter 157, at 28 U.S.C. 2323, which accords separate "party" status to the ICC "as of right" in any action "involving the validity of [an ICC] order or requirement."[7]

(3) The Railway Labor Executives' Association ("RLEA") agrees with the Commission that a proper resolution of the issue of the interrelationship between the ICA, RLA and NLGA is of quintessential importance. Indeed RLEA or one its its constituent elements has itself filed a number of petitions for writs of certiorari in other cases presenting these issues.[8] In this case RLEA bases its

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[6] The Solicitor General does not argue that Section 1254(1) would be unavailable even to him in a Hobbs Act case. Section 1254(1) invests this Court with plenary authority to consider petitions from any party to any civil case, before or after rendition of judgment. Other statutory provisions for review on certiorari "merely overlap § 1254(1) without in any way detracting from it." Stern, Gressman and Shapiro, Supreme Court Practice 40 (6th ed. 1986).

[7] As discussed above (p. 3-5) the Solicitor General's position also overlooks the legislative history of the amendment bringing review of Commission orders under the Hobbs Act including the undertakings of the Attorney General and then Solicitor General Bork.

[8] The petitions presenting similar issues to the Court include: *RLEA v. Chicago & North Western Transportation Company, et al.*, No. 87-2049, filed June 14, 1988; *Pittsburgh & Lake Erie Railroad Company v. RLEA*, No. 87-1888, filed May 17, 1988; *RLEA v. Pittsburgh & Lake Erie Railroad Company*, No. 87-1589, filed March 24, 1988; *RLEA v. Guilford Transportation Industries, Inc.*, No.

(footnote continued on next page)

opposition to this Court's consideration of the Commission's petition for writ of certiorari on the erroneous premise that the termination of the sales agreement between P&LE and its original suitor renders the case moot as to the Commission. RLEA Opp., at 4, 7. In other words, having frustrated the transaction authorized by the Commission through resort to a combination of its asserted RLA rights and self help, RLEA now argues that the Commission has no right to a review of the legality of its conduct and the lower court decisions which condoned it.

At the outset we note that in the Commission's view RLEA's challenged actions represent a collateral attack not only on the application of the Commission's *Class Exemption* procedures to the instant controversy but also on the *Class Exemption* procedures themselves. No sales agreement is necessary when parties seek to consummate a transfer pursuant to the Commission's *Class Exemption* procedures. Thus, the order of the Commission under which transfer of P&LE's lines would take place to the prior or a subsequent purchaser still stands under challenge by RLEA.

Further, assuming the transaction out of which these petitions arose will not take effect, even the RLEA acknowledges (RLEA Opp., at 7 n.2) that the lower court order precludes P&LE from selling its lines to anyone before bargaining under the labor statutes. Effectively, therefore, the Commission is precluded from exercising any of its powers under the Interstate Commerce Act, and from "carry[ing] out" the Act, 49 U.S.C. 10321(a), as regards the rail properties of P&LE.

Moreover, the case is not moot merely because the conduct giving rise to the action has ceased. *City of Los*

87-1911, filed August 5, 1988; *RLEA v. Chicago & North Western Transportation Company,* No. 88-464, filed September 16, 1988.

Angeles v. Lyons, 481 U.S. 95 (1983).

In any event, controversy arising out of the Commission's claim that the ICA must preempt other laws which act as obstacles to transfers under 49 U.S.C. 10901 is "capable of repetition yet evading review" *Southern Pacific Terminal Co. v. ICC,* 219 U.S. 498 (1911). That doctrine is applicable here where the challenged action was of too short a duration to be fully litigated and there is a reasonable expectation that the same complaining party would be subject to the same action again. *Weinstein v. Bradford,* 423 U.S. 147 (1975).

Thus, in the Commission's view, there is no impediment to this Court granting the Commission's petition and joining it with the petitions in Nos. 87-1589 and 87-1888 as it has been requested to do by the P&LE September 20, 1988 filing, should the Court choose to do so.

(4) However, the Commission continues to believe for the reasons set forth in its Memorandum of June 23, 1988, filed in No. 87-1888, *P&LE v. RLEA,* that these proceedings are not the best vehicle for resolving the issues of the proper relationship of the ICA and Commission orders thereunder to the RLA and the NLGA. There we noted that the preferred vehicle for resolving these issues is *Burlington Northern R.R. v. United Transportation Union,* 8th Cir. Nos. 87-2581 and 87-2600 (May 31, 1988) (*BN*), then before the court of appeals on petitions for rehearing and suggestions for rehearing *en banc.* On September 16, 1988, a closely divided court denied the petitions for rehearing with four judges voting to rehear the case. (A copy of the Eighth Circuit's order is reprinted in the Appendix of this Reply). The Commission and Burlington Northern Railroad will file with the Court within the next thirty days, petitions for a writ of certiorari to bring that decision before this Court. Therefore, we respectfully renew

our request that this Court defer decision on the issuance of a writ of certiorari to the United States Court of Appeals for the Third Circuit until this Court has had the opportunity to consider the *BN* petitions and responses thereto.

CONCLUSION

1. The Court should accept the Commission's petition for filing.

2. For the reasons stated above and in the petitions for writs of certiorari filed by *Pittsburgh and Lake Erie Railroad Company* in No. 87-1888 and No. 87-1589, the Court should grant the petition for a writ of certiorari to review and reverse the decisions of the Third Circuit Court of Appeals, but should substitute the petitions in *BN supra,* if filed as we currently anticipate by no later than the end of October, as the vehicle for plenary consideration of the important issues presented by these and other petitions raising similar issues pending before the Court.

Respectfully submitted,

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DATED: OCTOBER 1988

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2581WM

BURLINGTON NORTHERN RAILROAD COMPANY, APPELLEE

vs.

UNITED TRANSPORTATION UNION, APPELLANT

No. 87-2600WM

BURLINGTON NORTHERN RAILROAD COMPANY, APPELLANT

vs.

UNITED TRANSPORTATION UNION, APPELLEE

**APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI**

Petition for rehearing en banc of Burlington Northern Railroad Company has been considered by the Court and is denied.

Judges John R. Gibson, Pasco Bowman, Roger L. Wollman and C. Arlen Beam voted to grant.

Petition for rehearing by the panel is also denied.

September 16, 1988

Order entered at the Direction of the Court:
/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 87-2581WM

BURLINGTON NORTHERN RAILROAD COMPANY, APPELLEE

vs.

UNITED TRANSPORTATION UNION, APPELLANT

No. 87-2600WM

BURLINGTON NORTHERN RAILROAD COMPANY, APPELLANT

vs.

UNITED TRANSPORTATION UNION, APPELLEE

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

AMENDED ORDER

Petition for rehearing en banc of Burlington Northern Railroad Company has been considered by the Court and is denied.

Judges John R. Gibson, Pasco Bowman, Roger L. Wollman and C. Arlen Beam voted to grant. Judge Frank Magill did not participate.

Petition for rehearing by the panel is also denied.

September 23, 1988

Order entered at the Direction of the Court:
/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit.

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